

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 28TH NOVEMBER 2007 / 7TH AGRAHAYANA 1929

CRP.No. 1623 of 2003

OP.12/2001 OF III ADDITIONAL MUNSIF'S COURT,THRISSUR

REVN. PETITIONERS: PETITIONERS:

1. VASANTHAKUMARI, AGED 46,
W/O. CHOVVANNOOR LATE GANGADHARAN,
CHEMBUKKAVU DESOM, VILLAGE, THRISSUR TALUK.
2. KRISHNA AGED 22, S/O. LATE GANGADHARAN,
CHEMBUKKAVU DESOM, VILLAGE, THRISSUR TALUK.
3. YAMUNA, AGED 24, D/O. LATE GANGADHARAN,
CHEMBUKKAVU DESOM, VILLAGE, THRISSUR TALUK.

BY ADV. SRI.P.K.ABOOBACKER(EDATHALA)

RESPONDENTS: RESPONDENTS:

1. SAROJINI, AGED 59, W/O. KOTTAPPADIKKAL SANKU,
PERAKAM, CHAVAKKAED TALUK. (DELETED)
2. VASANTHY, AGED 38, W/O. KUTTIKKATTIL KUMARAN,
IRINJALAKKUDA NADAVARAMBU DESOM.
3. V. VIKRAMAN, AGED 42, VAKKAD HOUSE,
PANAMPILLY NAGAR, KOCHI-36.
4. P.V. VIDYA SAGAR, AGED 41,
PARAPPOOR HOUSE, NEAR KARTHIAYANI TEMPLE,
AYYANTHOLE, THRISSUR.
5. K. JAYANTHI SOMAN, AGED 35,
PANNICHAKRATHIL HOUSE, NIRAMARUTH,
THIRUR, MALAPPURAM.
6. KARAPPAKKUTTY, AGED 35,
S/O. KANDARU, PUTHURUTHI HOUSE,
PERINGAVU POST, THRISSUR.

THE NAME OF THE FIRST RESPONDENT IS ALLOWED TO BE STRUCK OFF
FROM THE PARTY ARRAY AT THE RISK OF THE PETITIONERS AS PER
ORDER DATED 5.3.2007 IN I.A.NO.511 OF 2007.

R2 TO R6 BY ADVS. M/S.V.CHITAMBARESH AND T.C.SURESH MENON

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28/11/2007,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T.SANKARAN, J.

C.R.P. NO. 1623 OF 2003

Dated this the 28th day of November, 2007

ORDER

The question involved in this Revision is whether donees under a gift deed, who were made liable to pay certain amounts to certain persons under the terms of the gift deed, are entitled to deposit before the civil court the amounts so payable and get such deposit recorded, when the genuineness of the gift deed itself is disputed by the persons to whom the amounts are to be paid.

2. The petitioners in the Revision filed O.P.No.12 of 2001 on the file of the Court of the III Additional Munsiff, Thrissur, under Section 100 of the Transfer of Property Act, to record the deposit of amounts as per the terms of settlement deed, No.6148 of 1981, Sub Registrar's Office, Thrissur. The petitioners are the widow and children of late Gangadharan, who died on 21.1.2000. The first respondent is the sister of Gangadharan. Respondents 2 to 5 are the legal representatives of Kalyani, another sister of Gangadharan. The sixth respondent is the foster son of Ammu, mother of Gangadharan. The property in question belonged to Ammu. She executed settlement deed No.6148/81, Sub Registrar's Officer, Thrissur, in favour of her son Gangadharan. As per the terms of the settlement deed, the donee Gangadharan was liable to

pay Rs.2,000/- to the first respondent, Rs.2,000/- to the predecessor of respondents 2 to 5 and another sum of Rs.2,000/- to the sixth respondent. Gangadharan was prepared to pay the amounts to the respondents, but the respondents evaded receipt of the amounts. Notice dated 24.4.2000 was issued to the respondents. The first respondent received the amount and executed a receipt. However, the other respondents were not prepared to accept the amounts. The petitioners sought permission of the court to deposit Rs.4,000/- payable to respondents 2 to 6.

3. Respondents 2 to 6 opposed the prayer in the application. They contended that the application is not maintainable in law. The settlement deed in favour of Gangadharan is not a genuine document. Ammu was under treatment from 1980 onwards and she was not having a sound disposing state of mind. The property dealt with under the settlement deed is worth at least Rs.5 lakhs. Respondents 2 to 6 further contended that the settlement deed is not binding on them or the property.

4. Before the court below, the respondents contended that Section 100 of the Transfer of Property Act is not applicable to the case and that the civil court has no jurisdiction to grant the relief as prayed for by the petitioners and to record the deposit. Since the genuineness of the gift deed is disputed, the proper remedy for the petitioners is to institute a suit for declaration before the competent civil court.

5. The court below held that the petition is not maintainable and the remedy of the petitioners is to file a suit. Reserving the right of the petitioners to file a suit for declaration, the petition was dismissed.

6. Sri.Chandrasekhar, learned counsel appearing for the revision petitioners submits that the application is maintainable and all that is required to be done by the court below is to record the deposit of the amount payable as per the terms of the settlement deed. He also submits that the petitioners limit their relief to record such deposit and that it is not necessary to render a finding that their liability under the gift deed stood discharged, though such a prayer was made before the court below. Sri.Chandrasekhar submits that the petitioners are not obliged to file a civil suit for declaration of their title, as, according to the petitioners, there is no cloud on their title. He also submitted that the petitioners cannot be compelled to institute a suit which they do not want to.

7. Sri.Chitambaresh, learned senior counsel appearing for the respondents supported the order passed by the court below. According to him, there cannot be an application for just recording a deposit without adjudication of the right, title and interest of the parties, which are in dispute as evidenced by the petition and counter in the proceedings. When such a dispute is raised, it is necessary to resolve such a dispute;

and in the Original Petition which was filed by the petitioners, such adjudication is not possible. He, therefore, submits that the court below was right in relegating the petitioners to a properly constituted civil suit before the court having jurisdiction. The counsel on both sides brought to my notice the decisions in **Narayana Kurup v. Manoharan (1991 (2) KLT 330); Balakrishnan v. Bhaskaran (1987 (2) KLT 733) and Bishwanath Prasad Singh v. Rajendra Prasad and another ((2006) 4 SCC 432).**

8. In **1991 (2) KLT 330**, the Original Petition was filed before the civil court to record the deposit of amounts payable as per the stipulation contained in a Will. The genuineness of the Will was disputed by the respondent in the application. The civil court permitted the petitioner to deposit the amount, which was challenged in Revision. The revision petitioner therein contended that there is no provision in the Indian Succession Act enabling the party to approach the civil court to make deposit of any amount and the court was not justified in allowing the application. Negating that contention, it was held thus:

“... Though the Indian Succession Act does not make any specific provision regarding the mode of payment of the amount under a will to the legatee, Court's power to allow a person to deposit the amount in the Court under S.151 C.P.C cannot be denied. As the revision petitioner is a legatee entitled to Rs.2,000/- and the respondents were duty bound to pay the said amount to him, they could comply with the directions in the will by offering it to the legatee and in case of refusal, by approaching the civil Court with the prayer to allow them to deposit the amount with notice to the

legatee. Case of the respondents is that they offered the amount to the revision petitioner and he did not accept it. In such a situation, it is not possible to hold that the civil Court is helpless. It is always open to the Court to do what is fair and equitable. As the respondents approached the Court to perform their obligation under the will, the Court could not have refused them permission to deposit the amount on the ground that there is no express provision in the Code or the Rules to allow it ignoring its power under S.151 C.P.C., to do what is fair and equitable. It is trite law that S.151 does not empower the Court to do anything in contravention of any specific provisions of the Code or Rules. But so long as there is no express provision in the Code or Rules interdicting a particular thing S.151 can be invoked by a party. S.151 can be invoked by a party where the proposed action by the Court does not infringe any of the provisions in the Code or Rules or provisions in any statute. As S.151 makes the statutory recognition of the inherent power of the Court to do things *ex debito justitiae*, the Court can exercise it to meet the ends of justice so long as it does not transgress any specific provision in the Code or Rules or provision under any statute. In circumstances like the present one, it is not proper to set limitations on Court's inherent powers to grant relief.”

9. In **(2006) 4 SCC 432**, the suit was for a declaration that the transaction entered into between the parties, though ostensibly expressed as a deed of sale, was in fact a transaction of usufructuary mortgage and for a further declaration that the said transaction stood redeemed under the Bihar Money Lenders Act, 1974. The plaintiff therein filed a Miscellaneous Application before the civil court under Section 83 of the Transfer of Property Act seeking permission of the Court to deposit the amounts payable under the document. Objection was taken by the defendant (respondent in the application) that the transaction in question was not a mortgage. Nevertheless, the civil court permitted the deposit to

be made. The question which arose for consideration before the Supreme Court was whether the subsequent suit for declaration was barred by res judicata in view of the order passed by the civil court in the Miscellaneous Case accepting the deposit. Dealing with these contentions, the Supreme Court held thus:

“37. The provision merely permits the mortgagor to deposit the mortgage amount. Even in a case where such deposit is made, in the event the mortgagee refused to accept the deposit, the mortgagor would have no option but to institute a suit for redemption relying on the mortgage money deposited. The respondent did not file a suit for redemption. It may be that the appellant objected to the said deposit but despite the fact that the purported mortgage amount was allowed to be deposited, the same being not binding upon the mortgagee as he could not be compelled to accept the same, the question of applying the principles of res judicata would not arise. (See Chandramani Pradhan v. Hari Pasayat (AIR 1974 Ori. 47). By reason of such deposit the status of the parties is not altered. For filing a suit for redemption by the mortgagor, deposit under Section 83 is not a precondition.

38. It is well known that the function of a court in terms of Section 83, Transfer of Property Act is procedural in nature.”

In the concurring judgment, Justice P.K.Balasubramanyan held, following the decisions in **Cherukuri Ramakrishniah v. Sri.Krusha Vidyalaya Sangam** (AIR 1945 Mad 46); **N.Govindaswami v. R.Bukkim** ((1983) 2 MLJ 207) and **Chandramani Pradhan v. Hari Pasayat** (AIR 1974 Orissa 47), that in an application to record deposit under Section 83 of the Transfer of Property Act the question of correctness of the amount could

not be gone into and that such questions are beyond the scope of Section 83 of the Transfer of Property Act. It was also held that if the proceedings were only ministerial as held by the Privy Council and the various High Courts, obviously it could not be argued that anything was “heard and finally decided” in a proceeding under Section 83 of the Transfer of Property Act so as to attract the bar of res judicata.

10. In **Balakrishnan v. Bhaskaran (1987 (2) KLT 733)**, the question involved was whether deposit of the amounts under Section 83 of the Transfer of Property Act would extinguish the mortgage. Dealing with that question, the Division Bench held as follows:

“6. As there was no possibility of getting this right extinguished by act of parties, the respondent-decree holder first sought relief under S.83 T.P.Act and accordingly deposited the amount remaining due on the mortgage as on that date and sought an order directing notice to the petitioner. The petitioner herein, instead of receiving the money, disputed the correctness of the same, it is argued on behalf of the petitioner-whatever that be- and consequently the petition was dismissed. It is by now well established that the making of a deposit of the mortgage money under S.83 does not ipso facto extinguish the mortgage where the mortgagee has refused to accept the deposit. To put it differently if the deposit is not accepted, the mortgage does not get extinguished; that means the parties continue to have the relationship of mortgagor and mortgagee. The mortgagee in such circumstances, holds the property as a kind of trustee for the mortgagor and as such accountable to the latter for profits. In other words the mortgagee continues to be a mortgagee with the statutory liability to account for the profits received by him from that date. In such circumstances it is for the mortgagor, if he wants to redeem the mortgage, to bring a suit for the enforcement of his legal rights and unless and until he does so successfully, the

mortgage continues to subsist. (See *Rukhminibai v. Venkatesh*, I.L.R. 31 Bom. 527 and *Harbans v. Ramdhari* (A.I.R. 1960 Pat. 51).”

11. In **Rajakrishna Menon v. Sundaram Pillai (1963 K.L.T.1031)**, the suit was filed on a hypothecation bond for realisation of the principal and interest due as per the bond. After the institution of the suit, the defendant filed a petition under Section 83 of the Transfer of Property Act and deposited the amount, which, according to him, was payable. The question which arose for consideration was whether the plaintiff was entitled to future interest after the deposit. It was held thus:

“2. The first point for consideration is about the validity of the deposit under S.83 of the Transfer of Property Act. It has been held in *A.Thiagaraja Aiyar v. G.Ramaswami Aiyar* (AIR 1919 Madras 948 (2)) that this Section has no application and does not enable a deposit to be made once a suit is laid. This has been followed in the case reported in *Nivarthi Bala Chengiah v. Busetty Subbayya* (AIR 1939 Madras 200). The reason, is that once a suit is filed, the amount due on the mortgage can be ascertained only after the decree is passed, which may provide for interest and other matters. Order XXIV, C.P.C makes provision to enable a deposit or payment into court being made and to stop the accrual of future interest. Indeed, the learned counsel did not contend against the above decision. For this reason the deposit made under S.83 was not valid. At no time was this transferred to the credit of the suit to enable the defendant to avail himself of the provisions of Order XXIV.”

12. In the present case, the petitioners invoked Section 100 of the Transfer of Property Act. For the sake of convenience, relevant portion of Section 100 is extracted below:

“100. Charges:-- Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.”

As per Section 100, all the provisions in the Transfer of Property Act which apply to simple mortgage shall, as far as may be, apply to a charge. The amount payable as per the terms of the settlement deed, according to the petitioners, constitutes a charge on the property. The petitioners wanted the charge to be redeemed and, therefore, filed the Original Petition with a prayer to permit them to deposit the amount payable under the terms of the settlement deed. In view of the provision in Section 100 that the provisions of the Transfer of Property Act relating to simple mortgage shall apply to the charge, the petitioners could file the Original Petition under Section 83 of the Transfer of Property Act. Though the petition does not state that it was filed under Section 83 of the Transfer of Property Act, in sum and substance, the petition is under Section 83 as the averments in the petition and the relief prayed for in the petition would disclose. In order to record the deposit under Section 83 of the Transfer of Property Act or to record the same by invoking Section 151 of the Code of Civil Procedure, the Court is not expected to decide the disputes between the parties relating to the genuineness or otherwise of the document or the respective rights and liabilities of the parties or the

entitlement of any party to receive any amount or as to the sufficiency of the amount or any other matter which is required to be settled in a properly constituted civil suit. The jurisdiction of the Court in disposing of such an Original Petition is only procedural and ministerial in character as held by the Supreme Court in (2006) 4 SCC 432. The Court need only look into the document and ascertain whether the petitioners are liable to pay certain amounts to the respondents as per the terms of the said document. If the Court is satisfied that there is such a liability, permission can be granted to the petitioners to make the deposit. The court shall not in such case decide the question whether the settlement deed is genuine or whether the donor had the required sound disposing state of mind at the time of execution of the document, or whether the document is vitiated by fraud, undue influence or coercion. Such questions are alien to a petition under Section 83 of the Transfer of Property Act or one under Section 151 of the Code of Civil Procedure to record the deposit. Once the deposit is recorded, the liability of the person bound under the document to discharge the liability would come to an end. The petitioners cannot be compelled to indulge in a suit on title or a suit for declaration, when according to them, there is no cloud on their title or when they do not want any declaration in respect of their title. It is not for the court to compel a party to institute a suit. When a petition of the nature now under consideration is filed, the only requirement is to ascertain whether the petitioners are liable to pay the amount and whether

they are prepared to make the deposit. After service of notice on the respondents, the court can record the deposit and relegate the parties to agitate all their contentions and the defence in a properly constituted civil suit.

13. For the aforesaid reasons, I am of the view that the court below was not justified in holding that the remedy of the petitioners is to file a suit for declaration of title in the civil court. The order passed by the court below is set aside. The court below shall record the deposit and close the Original Petition allowing the parties to work out their other remedies in a properly constituted civil suit. It is made clear that the relief for declaration that the petitioners stood discharged of their liability is not necessary in the facts and circumstances of the case and, therefore, that question is also left open.

The Civil Revision Petition is allowed as indicated above. No order as to costs.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

C.R.P.NO. 1623 OF 2003 A

ORDER

28th November, 2007
